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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-205

EUGENE VERNON HARRIS,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

Petition For a Writ of Certiorari to the
Judgment of the Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO
GRANTING A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia in this case of May 9, 1975, not be granted.

This petition results from a decision by the Supreme Court of Virginia of May 9, 1975, denying a petition for a writ of erro

and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond, Division I, of July, 1974. The denial of the petition is set forth in the appendix to the petition for a writ of certiorari previously filed in this Court, and it will not be reported. The judgment of the Circuit Court of the City of Richmond, Division I, which was the basis for the petitioner's unsuccessful petition to the Supreme Court of Virginia is also found in the appendix to the petition for a writ of certiorari, previously filed in this case, and it will not be reported.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to enter the writ of certiorari is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is A Civil Proceeding, Wherein A Person Is Classified As An Habitual Traffic Offender And Which Does Not Result In The Direct Threat Of Incarceration, Subject To A Constitutional And Collateral Attack Under The Retroactivity Of The Rule Enunciated In Argersinger v. Hamlin, 407 U.S. 25 (1972), When The Underlying Misdemeanor Convictions Are Fully Served And Impose No Direct Threat Of Reincarceration?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the petition for a writ of certiorari previously filed in the case.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

The respondent Commonwealth agrees substantially with the statement of the case as it is set out in the petition for a writ of certiorari to the Supreme Court of Virginia, previously filed.

The petitioner is attacking proceedings under the Virginia Habitual Offender Act, §§ 46.1-387.1, et seq., Code of Virginia (1950), as amended, which requires that any person, convicted within a ten-year period of three or more specific categories of motor vehicle offenses, as listed in the Act, shall be adjudged an habitual offender and lose driving privileges for a period of at least ten years. Of the three convictions, mentioned in the petition for a writ of certiorari, the petitioner does not challenge his conviction of January 14, 1969. The respondent notes that of the remaining two convictions, the conviction of September 1, 1971, involved no actual jail sentence.

In the habitual offender proceeding in the Circuit Court for the City of Richmond, the petitioner argued that the second and third convictions were void for purposes of the habitual offender proceeding, because petitioner alleged that he was uncounseled and indigent. The trial court judge did not give retroactive effect to the constitutional rule enunciated in Argersinger v. Hamlin, 407 U.S. 25 (1972). At that time the Supreme Court of Virginia had not applied the decision in Argersinger, supra, retroactively. See Potts v. Superintendent, 213 Va. 432, 192 S.E.2d 780 (1970). Immediately prior to the time the Supreme Court of Virginia denied the petition for a writ of error to the judgment of the Circuit Court for the City of Richmond, the Court had rendered its decision in Whorley v. Commonwealth, 215 Va. 740, ___ S.E.2d ___ (1975), which is currently before this Court in a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia in Case No. 75-152.

In Whorley, however, the Supreme Court of Virginia did apply Argersinger retroactively, but the extent of the retroactive application was not extended in Virginia to situations, as in the instant case, where the term of imprisonment of the contested misdemeanor conviction has been served fully, and the only remaining effects of the misdemeanor conviction in question are totally collateral and involve no direct threat of imprisonment.

ARGUMENT

The Decision Of The Supreme Court Of Virginia To Deny A Writ of Error In This Case Is Correct, Since The Use Of An Uncounseled Misdemeanant Conviction In A Subsequent Civil Proceeding Where There Is No Direct Threat Of Imprisonment Does Not Violate The Rights Of A Defendant Under The Sixth And Fourteenth Amendments To The Constitution Of The United States.

The respondent does not contest here that Argersinger v. Hamlin, supra, holds that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petit, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 37. Nor is it contested that the decision must be given retroactive effect in cases where there is a case or controversy sufficient to invoke the jurisdiction of a Federal court. Berry v. Cincinnati, 414 U.S. 29, 30 (1973). Imprisonment without counsel, as Mr. Justice Douglas indicated in the concluding paragraph of his opinion, is voided:

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." 407 U.S. 40.

This petitioner does not face reincarceration as a result of either misdemeanor conviction like the petitioner in Berry, supra. Here the petitioner's second conviction did result in a ten-day jail sentence served long ago. The third conviction of September 1, 1971, which the petitioner challenges through his habitual offender determination, did not result in the loss of his liberty, and as such does not fit within the confines of the rule.

The petitioner further relies on Berry, supra, because of the cases cited by this Honorable Court with respect to the proposition that one, who asserts that he is entitled to the benefit of Argersinger, must allege and prove a bona fide existing case or controversy sufficient to invoke jurisdiction. These decisions, Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); and Ginsberg v. New York, 390 U.S. 629 (1968), dealt with the question whether a case, pending in this Honorable Court and dealing with a criminal conviction, becomes moot when the prisoner is released from custody. This Honorable Court concluded that the cause does not become moot, so long as the prisoner was in custody at the time of the initiation of the appeal and so long as there was some serious collateral consequence from the conviction that still adhered to the prisoner. For example, in Sibron, supra, this Court referred back to the earlier decision in Carafas and stated the following:

> "Only a few days ago we held unanimously that the writ of habeas corpus is avialable to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had not been released before this Court could adjudicate his claim." 392 U.S. 51. (Emphasis added.)

Consequently, these three cases are inapplicable to the instant case, because the petitioner here is not "in custody" nor has he been "in custody" at any point because of his habitual offender determination. The petitioner has long since served the one misdemeanor conviction for which a jail sentence was imposed, and he did not attack those convictions directly. He is using the appellate process after the civil habitual offender determination as a vehicle to challenge the underlying convictions, and the distinction is that there is no direct threat of imprisonment as a result of either the determination or the underlying convictions. The misdemeanor convictions only affect the petitioner collaterally and do so in a civil action as opposed to a criminal action, since an habitual offender proceeding under Virginia law is a civil one and not a criminal one. See e.g., Huffman v. Commonwealth, 210 Va. 530, 172 S.E.2d 788 (1970); Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941). See also Note, "The Virginia Habitual Offender Act," 26 Wash. & Lee L.Rev. 271 (1969). It is on the basis of this distinction that the Supreme Court of Virginia in Whorley v. Commonwealth, supra, while supporting the retroactivity of Argersinger, did not extend it to situations where the convictions themselves or imprisonment as a result thereof were not directly before the Court.

The law in Virginia is consistent with and relies upon opinions in the Fourth Circuit with respect to retroactivity. In Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), the Court rejected a contention that the civil description of the habitual offender proceedings was not determinative because of the criminal consequences

which could flow from driving a motor vehicle during the period of revocation. An habitual offender "comes under the threat of incarceration only if he subsequently determines to take the law into his own hands and to operate a motor vehicle on the public highway without a valid permit." 485 F.2d 506. The Court noted that the criminal consequences are not direct but collateral so that any consequences therefrom are entirely independent of the earlier adjudication as an habitual offender. Criminal consequences from the habitual offender determination develop only if the offender takes the additional step of driving after his license has been revoked, which is not the case here. The petitioner does not live under any direct threat of incarceration.

The Fourth Circuit gave retroactive application to Argersinger prior to this Court's decision in Berry, supra. See Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973). Marston was reaffirmed subsequent to Berry, supra, in Morgan v. Juvenile and Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974). The recent case of Mays v. Harris, ___ F.2d ___, Case No. 74-1409 (4th Cir. 1975), in which the Court of Appeals for the Fourth Circuit withdrew its first conflicting decision, does not affect the previous conclusions reached in Marston, supra, since Marston is never mentioned. The concurring opinion in Mays, supports the result for the reasons expressed by the Supreme Court of Virginia in Whorley, supra.

Although Marston, supra, was a habeas proceeding initiated while he was in custody, the facts are analogous to the facts in this case, since Marston had not been convicted of driving after his license had

been revoked. The Court of Appeals addressed contentions similar to that of the petitioner here by referring to the first decision of the United States Court of Appeals for the Fifth Circuit in Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973). Where the effect of the uncounseled prior misdemeanor conviction was the automatic and immediate loss of liberty on the part of a defendant, the Fourth Circuit would apply retroactively the decision in Argersinger. Seen in this perspective, the case of Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972), is not necessarily inconsistent with the opinions in the Fourth Circuit and the Supreme Court of Virginia. The petitioner there actually faced reincarceration directly from the proceedings which he challenged, the parole revocation hearing, which made use of the prior conviction. The petitioner in this case faces no such direct threat, and it is submitted that the Fourth Circuit is correct in precluding retroactivity from a fully served sentence which has no direct criminal disabilities flowing from it.

Although there is a loss of the privilege of operating a vehicle on the highways of the State, it is the loss of a civil right in a subsequent civil proceeding. The habitual offender does not live under a threat by the State of incarceration nor are any fines imposed. The previous convictions in the habitual offender adjudication have only an indirect effect on the criminal process that may subsequently place the offender in peril of liberty by imprisonment. The paramount constitutional consideration of due process present in

a criminal context, where an individual is directly threatened with incarceration as a result of the misdemeanor conviction, is absent in the case of all civilly declared habitual offenders, and the respondent would submit no subtantial Federal question exists. While the right to counsel is necessitated in all criminal prosecutions where there is the threat of incarceration, the interest in retroactive application beyond this scope of Argersinger and Berry, supra, is not an issue which demands the discretionary application of the writ of certiorari. The uncounseled misdemeanant does not suffer the many serious collateral disabilities that an uncounseled felon does. When the substantial interest of the people of a state in safe highways, as expressed by the legislature of that state, is balanced, it mitigates against greater expansion of the rule. Furthermore, the near impossible task of the retrial of all uncounseled misdemeanants who received actual jail sentences should not be damanded merely to preserve the collateral effect.

It is submitted that the Supreme Court of Virginia was entirely correct in its decision to deny the petition for a writ of error and that this Court should exercise its discretion in a similar manner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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